STATE OF MICHIGAN

COURT OF APPEALS

RYAN ROSETT,

Plaintiff-Appellant,

v

DAVID TREPECK,

Defendant-Appellee.

UNPUBLISHED
June 20, 2006

No. 258531
Oakland Circuit Court
LC No. 2004-058865-CZ

Before: Markey, P.J., and Schuette and Borrello, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I concur in the majority's opinion that because plaintiff prayed to have the settlement agreement enforced, the trial court abused its discretion in concluding that plaintiff did not adequately plead for $25,000, which defendant owed pursuant to their settlement agreement. I would also note that even if plaintiff had not adequately plead for $25,000, the trial court should have allowed plaintiff to amend his complaint. Here, plaintiff requested the opportunity to amend its complaint at the motion for summary disposition. Generally, leave to amend a complaint shall be freely granted where justice requires. MCR 2.118(A)(2); *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003).

However, I respectfully dissent in the conclusion reached by my distinguished colleagues in the majority that the contract between the parties, two apparently savvy business associates, contained an unenforceable penalty clause.

I. FACTS

In this case, the parties are businessmen and have been acquainted for many years. This dispute revolves around three, somewhat connected, related transactions between the parties.

In April of 1999, defendant purchased all of plaintiff's shares in Lone Star Coffee Co. for $350,000, with defendant promising to pay this sum over a three-year period. Lone Star guaranteed defendant's indebtedness in this transaction. Plaintiff obtained a security interest in all of Lone Star's assets and apparently perfected its interests as well with appropriate UCC filings. A second transaction occurred in March of 2001, where an entity named JavaHutt Two, promised to pay $140,000, with $65,000 due immediately, to plaintiff's father. The agreement provided that periodic payments were to be paid as follows:

> 2. Payments. Contemporaneously with the execution of this Note, Borrower shall pay to Creditor the sum of Sixty Five Thousand and 00/100 Dollars ($65,000.00). The remaining principal and interest on this note shall be paid in monthly installments pursuant to the attached amortization which is incorporated herein by reference as Exhibit 'A'. However, said payments will not commence until [Robert] provides termination of UCC financing statements filed by James R. Lites – File # D528942 and [plaintiff] – File # D507670 on the above referenced lease address and equipment.

It is not fully clear from the record here, but it seems that this second transaction occurred because JavaHutt Two purchased the assets of Lone Star.[1]

According to plaintiff, defendant failed to make proper payments on this second agreement. As a result, negotiations between the parties were ongoing, with the specter of defendant filing bankruptcy looming in the background. In August of 2001, the parties entered into a settlement agreement. This third transaction was an effort to resolve the indebtedness of defendant to plaintiff from the previous contracts. The settlement agreement contained the following key provisions:

> WHEREAS, on or about April 16, 1999, [defendant] executed as maker to [plaintiff] as Payee its [sic] promissory note in the principal sum of Three Hundred Fifty Thousand ($350,000) Dollars (the "Note"). A copy of the Note is attached as Exhibit A . . . [Settlement agreement, ¶ 2.]
>
> * * *
>
> [Defendant] will, upon the execution of this Agreement, pay to [plaintiff] the sum of $50,000 in United States Currency upon the execution of this Agreement. [sic] [Settlement agreement, ¶ 2.]
>
> Robert Rosett has assigned, without recourse, to Ryan [plaintiff], the Lone Star Note, free and clear of any claims to payment thereon by Robert Rosett, and/or any other party. A copy of the assignment is attached hereto as Exhibit C. [Settlement agreement, ¶ 3]
>
> * * *
>
> If the Lone Star Note is paid in full to [plaintiff] during its term then, in that event, [defendant] shall pay to [plaintiff] within thirty (30) days after the Lone Star Note is paid in full the sum of $25,000. If [defendant] fails to pay said

[1] This case involves factual issues that merit a dose of clarity to better sort out the contractual relationships and obligations between the parties.

> $25,000 as herein set forth, then he shall be liable for $100,000 for breach of this covenant without further notice. [Settlement agreement, ¶ 19 [sic].[2]]
>
> * * *
>
> Pursuant to the Lonestar [sic] Note: (i) James Lites releases any and all claims which he may have against Lonestar, including, without limitation, release of any UCC filings in the State of Michigan, or otherwise, and (ii) Rosett releases any and all claims against Lonestar, including, without limitation, release of any and all UCCs filed in the State of Michigan, or elsewhere. The Releases are attached hereto as Exhibit D. [Settlement agreement, ¶ 12 [sic].]
>
> * * *
>
> This agreement represents the entire agreement between the parties hereto regarding the subject matter contained herein. There are no oral agreements between the parties effecting this agreement, and this agreement supersedes and cancels any and all previous negotiations, arrangements, agreements and understandings, if any, between the parties respecting the subject matter contained herein. . . . [Settlement agreement, ¶ 14 [sic].]

This third contract basically contained a $25,000/$100,000 provision, meaning that if the Lone Star note was paid in full, then defendant had 30 days to pay plaintiff the sum of $25,000. If the defendant failed to pay plaintiff $25,000, during the 30 day window, then defendant would owe plaintiff $100,000.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing the motion, the pleadings, affidavits, depositions, admissions, and any other admissible evidence are viewed in the light most favorable to the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374, 501 NW2d 155 (1993). More importantly as applied to this case, questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408, 646 NW2d 170 (2002); *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511, 620 NW2d 531 (2001). In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47, 664 NW2d 776 (2003).

III. ANALYSIS

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[2] The paragraphs are not numbered sequentially as paragraph nineteen immediately follows paragraph four.

The trial court and my distinguished colleagues in the majority conclude that this $25,000/$100,000 provision is an unenforceable penalty, deeming it to be "unconscionable or excessive". I disagree.

The recent decision of our Michigan Supreme Court in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), establishes a framework of analysis for the case now before this Court. Here, the parties appear to be experienced hands in business dealings or if not expert, certainly not naïve or lacking the capacity to contract as mature adults. The contract between these parties was unambiguous and should be given its plain meaning. As Justice Young stated in *Rory*:

> A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.* Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that " '[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' " [*Rory, supra* at 468 (emphasis in original; footnotes omitted)].

It would be inappropriate for this Court to impose its judgment on the reasonableness of this $25,00/$100,000. provision entered into by these businessmen. Their initial contract called for a payment of $350,000. Assets were sold. Guarantees were made. Bankruptcy clouds were on the horizon. A final contract was made, this settlement agreement was agreed upon by the parties. The Michigan Legislature has not chosen to pass a statute prohibiting a liquidated damages clause similar to the $25,000/$100,000 provision agreed upon by the parties in this case. Again, as stated in the Rory decision, "[o]nly recognized traditional defenses may be used to avoid the enforcement of the contract provision" *Rory, supra* at 470 (footnote omitted). Examples of traditional defenses include duress, waiver, estoppel, fraud, or unconscionability. *Id.*

I would conclude that the application of *Rory* is not limited to insurance cases. Rather the closing section of *Rory* addresses contracts as a whole, and only subsequently addresses the narrow aspect of insurance contracts:

> Consistent with our prior jurisprudence, unambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy. Judicial determinations of "reasonableness" are an invalid basis upon which to refuse to enforce unambiguous contractual provisions. [*Rory, supra* at 491].

Here, defendant appears to argue that the $25,000/$100,000 provision falls within the traditional defense of unconscionability. I disagree. MCL 440.2302 provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the

> unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Here, the subject matter of the agreement was defendant's $350,000 debt to plaintiff. In accordance with the agreement, defendant paid plaintiff $50,000 and JavaHutt paid plaintiff a total of $75,000. Defendant was required to pay plaintiff $25,000 within 30 days after JavaHutt made its final payment on April 3, 2004. If JavaHutt defaulted, plaintiff would have been required to provide defendant with notice in accordance with paragraph four of the agreement. However, JavaHutt did not default. No matter how unfair defendant finds the provision, the provision did not require plaintiff to give defendant notice that JavaHutt made its final payment. Because defendant failed to do so, he was required to pay plaintiff $100,000. However, the trial court only reviewed the reasonableness of the liquidated damages provision, without examining the rest of the agreement. Here, the sum of $100,000 must be viewed in connection with the underlying obligation of $350,000. In addition, the incentive provision did not exceed the contract sum. Therefore, the incentive provision is not excessive or unconscionable as the parties were in the best position to determine an appropriate incentive in light of the underlying circumstances. As a result, I would find that the agreement should be enforced as written.

I agree with plaintiff's argument that based on defendant's past conduct and threat to file bankruptcy, plaintiff had no choice but to enter into a settlement agreement. Defendant's argument that he was a mere innocent bystander waiting for notice of JavaHutt's final payment so he could pay plaintiff is unconvincing. Defendant was aware when the final payment was due as the amortization schedule was attached to the settlement agreement. Moreover, defendant actually negotiated the schedule with JavaHutt. Therefore, defendant's performance was possible.

I would reverse the decision of the trial court and would hold that the contract provision in this case should be enforced as written in favor of plaintiff.

/s/ Bill Schuette